

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 IRONDALE COMMUNITY ACTION  
3 NEIGHBORS (ICAN) et al.,

Case No. 07-2-0012c

4 Petitioners,

**ORDER ON PETITIONERS' MOTION  
FOR RECONSIDERATION**

5 v.

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7  
8 JEFFERSON COUNTY,

9 Respondent.  
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12 THIS Matter comes before the Board upon Petitioners' Motion for Reconsideration of the  
13 Board's August 12, 2009 Compliance Order.<sup>1</sup> Jefferson County opposes the Motion.<sup>2</sup>

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15 **DISCUSSION**

16 A motion for reconsideration of a final decision of a Board is governed by WAC 242-02-832.  
17 WAC 242-02-832(2) provides that a motion for reconsideration must be based on at least  
18 one of the following grounds:  
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- 20 (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking  
21 reconsideration;  
22 (b) Irregularity in the hearing before the board by which such party was prevented from  
23 having a fair hearing; or  
24 (c) Clerical mistakes in the final decision and order.

25 The Board notes that the Motion is based on the criteria in WAC 242-02-832 (a) and (c).<sup>3</sup>

26 • Clerical Errors

27 Although ICAN contends clerical mistakes are contained in the Board's Compliance Order,<sup>4</sup>  
28 the Board only finds a single reference and this has been relegated to a footnote.<sup>5</sup> As this  
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31 <sup>1</sup>Petitioners' Motion for Reconsideration, filed August 20, 2009.

32 <sup>2</sup>Jefferson County's Response to ICAN's Request for Consideration.

<sup>3</sup>Petitioners' Motion for Reconsideration, at 1.

1 Board has stated before, when filing a motion for reconsideration the burden is on the  
2 moving party to articulate not only the reason for its motion but where in the Board's Order  
3 the alleged error(s) are located.<sup>6</sup> To simply state that there are errors within the Order is not  
4 enough.

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6 With Footnote 1, ICAN states that the Board's reference to "5,106 existing lots in the UGA"  
7 should be modified with the word "residential" so as to read "5,106 existing residential lots."<sup>7</sup>  
8 ICAN cites Exhibit 16-902-1 to support this correction which is entitled "Lots of Record in  
9 Residential Zones of the UGA."<sup>8</sup> It should have been clear from the context of the  
10 discussion of development in the residential zone that the Board fully understood ICAN's  
11 argument regarding alleged errors in the County's population holding capacity and the  
12 failure to use the word "residential" did not lead the Board to a different conclusion regarding  
13 the soundness of ICAN's argument.  
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15  
16 **Conclusion:** The Board will note the error specifically cited by ICAN in its Motion but finds  
17 there is no need to amend and reissue the August 12, 2009 Compliance Order to reflect this  
18 error. ICAN has failed to provide adequate citation to any other alleged error and the Board  
19 will not address such unsupported allegations.  
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22 • ICAN's Prior Motion to Supplement the Record

23 ICAN contends that the Board failed to address its earlier Motion to Supplement the  
24 Record.<sup>9</sup> However, in fact, the Board did address this motion at the beginning of the June 2,  
25 2009 Compliance Hearing. At that time the County waived any objection to ICAN's Motion  
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28 <sup>4</sup> ICAN Request for Reconsideration, at 1 and 14.

<sup>5</sup> ICAN Request for Reconsideration, at 2, Fn. 1.

<sup>6</sup> *Friends of Skagit County, et al v. Skagit County*, Case No. 07-2-0025c, Order on Reconsideration at 8 (June 18, 2008).

<sup>7</sup> ICAN Request for Reconsideration at 2, Fn. 1.

<sup>8</sup> *Id.* In reviewing Exhibit 16-902-1, the Board notes that the total lot count is not shown on that exhibit but on Exhibit 16-902-04 and that in ICAN's briefing filed in April 2009 it states "the total is 5,106 existing lots."

<sup>9</sup> Petitioners' Motion for Reconsideration at 13. The Board presumes ICAN is referring to its May 26, 2009 filing – ICAN's Request to Supplement the Record, Shorten Time, and Have Supplement Considered.

1 to add sections of the County code, proposed Exhibit 16-904. The Presiding Officer orally  
2 ruled that the Record would be supplemented with those code sections.

3  
4 At this same time, ICAN had also moved to supplement the record with proposed Exhibit 16-  
5 903, a 2004 web publication entitled "Portland Catalog for Narrow House Designs". The  
6 Presiding Officer granted the motion, over the County's objection, but did reserve judgment  
7 on the weight to be accorded to that exhibit.  
8

9 **Conclusion:** Contrary to ICAN's assertion, the Board ruled on ICAN's proposed  
10 supplemental exhibits at the June 2, 2009 Compliance Hearing, admitting both of the  
11 proposed exhibits.  
12

13 • Invalidity

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15 ICAN argues that while the Board ruled on the compliance issues, it failed to rule on the  
16 existing invalidity orders or on the requests for additional findings of invalidity.<sup>10</sup>  
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18 As the Board noted in its August 2009 Compliance Order, Jefferson County's was subject to  
19 a Determination of Invalidity and, therefore, the burden was on Jefferson County to  
20 demonstrate that the actions it had taken to achieve compliance with the GMA no longer  
21 substantially interfered with fulfillment of the goals of the GMA.<sup>11</sup>  
22

23 The Board notes that with its Statement of Actions Taken, Jefferson County requested  
24 invalidity be lifted.<sup>12</sup> ICAN, both here with its Motion for Reconsideration and with its initial  
25 objections, contends the County has not met its burden for lifting invalidity.<sup>13</sup>  
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29 <sup>10</sup> Petitioner's Motion for Reconsideration, at 13.

30 <sup>11</sup> August 12, 2009 Compliance Order, at 5. As provided in RCW 36.70A.302(1), a finding of invalidity may be  
31 entered when a board makes a finding of noncompliance *and* further includes a determination, supported by  
32 findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would  
substantially interfere with the fulfillment of the goals of this chapter.

<sup>12</sup> April 9, 2009 Jefferson County's Statement of Actions Taken and Request for Lifting of Invalidity.

<sup>13</sup> April 24, 2009 ICAN's Objection to Lifting Invalidity and Finding Compliance, at 2, 13-14.

1 While the Board made earlier findings of invalidity in these consolidated appeals, in the  
2 August 2009 Compliance Order the Board found that, with the exception of the County's  
3 failure to clarify which rural development standards applied prior to sewer availability, the  
4 County had achieved compliance with the GMA. Since there can be no basis for a  
5 determination of invalidity in the absence of a finding of noncompliance, once the Board has  
6 determined that a local jurisdiction has remedied an area of non-compliance, any finding of  
7 invalidity that was based on that non-compliance is rescinded.  
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9  
10 In the Board's prior orders, the basis for invalidity was policies and regulations which would  
11 allow urban levels of development without corresponding urban services, namely sewer  
12 service. As noted in the August 2009 Compliance Order, the County's adoption of its  
13 General Sewer Plan demonstrates sewer will be available thereby satisfying a primary  
14 concern of the Board. As for development regulations, although the Board found clarity was  
15 needed it also concluded that the County was proceeding in a reasonable manner to  
16 transition from rural to urban development standards in the UGA.<sup>14</sup>  
17

18 The Board acknowledges it did not make a specific ruling as to the previous determination  
19 of invalidity and therefore will do so now. Based on the analysis in the August 2009  
20 Compliance Order and this Order on Reconsideration, the Board finds the County's actions,  
21 in and of themselves, sufficiently demonstrate its policies and regulations no longer interfere  
22 with the goals of the GMA. Although the Board has concluded the County's development  
23 regulations still require clarification, they do not rise to the level of substantial interference  
24 so as to warrant continued invalidity.  
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27 With regard to ICAN's assertion that the Board has failed to rule on its requests for  
28 *additional* invalidity orders, the Board notes that this request was based on the argument  
29 that the County cannot sewer Residential Area #3 during the 20 year planning horizon and  
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<sup>14</sup> August 12, 2009 Compliance Order at 12-13.  
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1 that therefore the Board should find the boundary of the UGA that adjoins Residential Area  
2 #3 invalid.<sup>15</sup> The Board rejected this argument.<sup>16</sup> Having rejected ICAN's arguments on  
3 GMA compliance, there was no basis for a finding of invalidity.  
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5 **Conclusion:** The Board acknowledges that it did not specifically rule on the question of  
6 invalidity in its August 2009 Compliance Order. However, a Determination of Invalidity is  
7 intrinsically linked to a finding of non-compliance and once the Board has found a  
8 jurisdiction has taken remedial actions which cure a previous finding of non-compliance  
9 upon which invalidity was based, invalidity is cured as well. Here, Jefferson County has  
10 cured many areas of non-compliance and all that remains is a clarification as to  
11 development regulations. Thus, the County's actions no longer substantially interfere with  
12 the GMA and invalidity is no longer warranted.  
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15 • Population Holding Capacity Analysis

16 ICAN argues the Board erred when it concluded that "the non-conforming plats would not be  
17 developable with new single family residences, as ICAN suggests".<sup>17</sup> ICAN also asserts the  
18 Board erred when it concluded that "it is reasonable to assume that [new single family  
19 residences] would develop in accordance with the density allowed in the Urban Low Density  
20 Residential zone."<sup>18</sup> Lastly, ICAN contends the Board erred when it concluded ICAN did not  
21 show that the County's population holding capacity analysis and size of the UGA were  
22 clearly erroneous.<sup>19</sup>  
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25 The major thrust of ICAN's argument in its Motion for Reconsideration is that, even if the  
26 County has the right to adopt an ordinance that does not recognize plats created by 1937-  
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30 <sup>15</sup> See, ICAN's Objection to Lifting Invalidity and Finding Compliance and Request for Additional Invalidity, at  
31 14-15.

32 <sup>16</sup> See, August 12, 2009 Compliance Order, at 7.

<sup>17</sup> Compliance Order at 14.

<sup>18</sup> Id.

<sup>19</sup> Id. at 15.

1 era and older plats, the County has not adopted such an ordinance. ICAN continues that,  
2 under its current ordinances, the County recognizes all existing platted and subdivided lots  
3 as buildable when Jefferson County Health Department sewage disposal regulations are  
4 met.<sup>20</sup> ICAN argues that the County Assessor continues to recognize 2,500 square foot  
5 substandard residential lots and the older plats with substandard lots have not been  
6 “invalidated” by the County.<sup>21</sup>  
7

8 However, these claims do not advance ICAN’s argument that these lots should have been  
9 recognized by the Board as developable lots. ICAN fails to acknowledge that even legally  
10 created lots are not developable if substandard.<sup>22</sup> ICAN’s argument further fails to  
11 recognize that County Health Department sewage disposal regulations neither implicitly nor  
12 explicitly supersede the clear density requirements set out at Table 3A-2 “Density and  
13 Dimensional Standards” of JCC 18.18 which establish a density of 4-6 units/acre for Urban  
14 Low Density Residential. While that table provides for higher densities under certain  
15 circumstances, it does not provide for development on single 2,500 square foot lots, as  
16 ICAN’s argument suggests.  
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18

19 While ICAN acknowledges that the County has made “permanent changes to development  
20 regulations in Section 5 of the Ordinance which adopts Chapter 18.18 to establish what are  
21 basically zoning regulations for the UGA”<sup>23</sup> it mistakenly relies upon the fact that the County  
22 did not also adopt provisions “invalidating the substandard lots on these older plats”<sup>24</sup> or  
23 otherwise amend its subdivision ordinances. ICAN also relies upon the County’s failure to  
24 “change the County’s practice of recognizing existing plats and existing lot lines.”<sup>25</sup> Such an  
25 argument reveals a lack of appreciation of the distinction between a legal lot and a  
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30 <sup>20</sup> ICAN’s Motion for Reconsideration at 2.

31 <sup>21</sup> Id. at 6.

32 <sup>22</sup> See, Dykstra v. Skagit County, 97 Wn. App. 670 (1999).

<sup>23</sup> ICAN’s Motion for Reconsideration at 7.

<sup>24</sup> Id at 6.

<sup>25</sup> Id. at 7.

1 developable lot. In general, a “legal lot” is any lot that was created by legal means (i.e.  
2 subdivision, testamentary devise, boundary adjustment).

3  
4 A “buildable” or “developable” lot is one that meets the zoning and health code  
5 requirements.

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7 In *Dykstra*, the Court noted that a legal lot may still be a non-conforming substandard lot  
8 because its land is insufficient to be a buildable site and that the legal lot status does not  
9 confer development rights.

10  
11 Here, the County properly based its holding capacity analysis upon developable lots. The  
12 County was under no requirement to first “invalidate” substandard lots in order to impose the  
13 density requirements of Table 3A-2.

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15 **Conclusion:** ICAN has not shown any error in the County’s holding capacity analysis and  
16 its Motion for Reconsideration fails to demonstrate that the Board erred in this regard. ICAN  
17 has not shown “misinterpretation of fact or law, material to the party seeking  
18 reconsideration”.  
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21 **ORDER**

22 Having reviewed Petitioner’s Motion for Reconsideration, the County’s Response, the  
23 relevant provisions of the GMA and the Board’s Rules of Practice and Procedure, in  
24 particular WAC 242-02-832(2), the Board finds that Petitioner has failed to provide a basis  
25 that compels reconsideration of the August 12, 2009 Compliance Order. Therefore, for the  
26 reasons set forth above, except for noting a single clerical error and providing clarification in  
27 regards to invalidity, Petitioners’ Motion for Reconsideration is hereby DENIED.  
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1 SO ORDERED this 11th day of September, 2009.

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James McNamara, Board Member

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7 William Roehl, Board Member

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10 Nina Carter, Board Member

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12 Pursuant to RCW 36.70A.300 this is a final order of the Board.

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14 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the  
15 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
16 judicial review may be instituted by filing a petition in superior court according to the  
17 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil  
18 Enforcement. The petition for judicial review of this Order shall be filed with the  
19 appropriate court and served on the Board, the Office of the Attorney General, and all  
20 parties within thirty days after service of the final order, as provided in RCW  
21 34.05.542. Service on the Board may be accomplished in person or by mail, but  
22 service on the Board means actual receipt of the document at the Board office within  
thirty days after service of the final order. A petition for judicial review may not be  
served on the Board by fax or by electronic mail.

23 **Service.** This Order was served on you the day it was deposited in the United States  
24 mail. RCW 34.05.010(19).